operated in a very irregular manner purchasing transcripts resulting to make an "off record" arrangement with Struckman's state court appointed "full counsel". The state trial court irregularities were the cause behind the Crim.R.44 prejudice in depriving Struckman understanding his "full counsel" right. Furthermore, in attach. J at {¶34-37}, appeal C-180287, *State v. Struckman* 2020 Ohio App.Lexis 1187, the said state appeals court determination unreasonably misrepresents state court appointed counsels "not able" incompetence as though it was merely because state court appointed counsel had other commitments. Struckmans state court appointed counsel has never stated anything in the 2018 state trial court record about another commitment as to his exact reason why he was "not able" to represent Struckman, while the aforesaid attachment B, appeal C-200069 *State v. Struckman* 2021-Ohio-1043 *Id.* advances to show the state appeal courts said determination in attach. J, C-180287 is an "unreasonable determination of the facts" because attachment B, state appeal C-200069 reveals an outstanding leading fact about the omitted state "trial courts email ***, outlining the procedure for addressing the request that "full counsel" take over the defense". The said email leads to prove that pertinent "off record" facts have in fact been overlooked and unfairly omitted from the state appeal C-180287 direct appeal record for consideration. The First Appellate District state court determination attachment B- C-200069 protectively presumes that the "off record" state trial court email shows the state trial court had been committed to complying with the waiver requirement yet in fact through reflection the state appeal record in state appeal C-200069 along with the Monday April 30, 2018 state trial court transcripts attach. G at T.p.1009 unlocks reasonable proof to reveal the state appeal C-180287 determination is an "unreasonable determination of the facts" cause state appeal C-200069 revealed lingering

leading "omitted facts" from this state appeal C-180287 determination and furthermore C-200069 concentrates understanding in the context beyond a question, that additional lasting omitted facts in fact do exist "off record" directly linked with the email from the 2018 state trial court pertaining to the Friday, April 27, 2018 proceedings and in relation to the deprivation of effective assistance of counsel activating when state court appointed standby counsel took over as "full counsel" to represent Struckman. The said determination in state appeal C-200069 designates the existence of obstacles in what the state court collectively misrepresents in reference to Struckman competently understanding the Crim.R.44 waiver and also as to what factually happened in the 2018 trial proceedings, in the record and "outside the record" with state court appointed counsel which includes purchasing transcripts, and all of the deprivation of rights that have been unreasonably omitted from this state appeal C-180287. Furthermore, see attachment G at T.p. 1004, Monday April 30, 2018 whereas "in" the state trial court record the state asserts Mr. Newburger advised us that he was "not able" to take over your defense. The aforesaid is clearly contrary to the "off record" email directive sent to state court appointed counsel Mr. Newburger by the 2018 state trial court on Saturday April 28th which the state court asserts in an autonomous manner "I will state for the record that Mr. Struckman has requested that you take over his defense for the remainder of the trial and that you have advised the court "you're not able to do so". The 2018 state trial court email that has been brought into the record through attachment B state appeal C-200069 *State v. Struckman* 2021-Ohio-1043 *Id.* certainly never references the omitted facts leading up to the 2018 state trial courts "off record" email from the critical stage in state trial courts "off record" irregularity in the state trial court proceedings whereas the unfair channel of communication took place

between Struckman's state court appointed "full counsel" and the state trial court which resulted in an "off record" prearrangement between the state trial court and state court appointed "full counsel" whereas the state trial court purchased trial transcripts "off record" in predetermination and in deliberate hindrance to deprive Struckman's predestined pro-se strategy and deprive his Const. VI right to effective assistance of counsel. The Monday April 30, 2018 state trial court record shows the state court appointed counsel's breakdown of communication consisted of handing Struckman two copies of a final transcript see attachment G at T.p.1009 which Struckman was given in opposition to a fair defense as a result from a "not able to do so" incompetent and ineffective state court appointed counsel's "off record" predetermination made with the state trial court. Furthermore, Struckman was unable to go over the entire transcript because he was deprived opportunity to "fully and fairly" go over the transcripts or counsel's strategy due to a "not able to do so" incompetent and ineffective state court appointed counsels "off record" serious disagreements, see attachment G at T.p.1015. Struckman was required by the state trial court to move forward with unraveled capabilities and a frayed inability to confer with state court appointed counsel in violation of U.S. Const. V, VI, XIV. The spectrum of state court appointed counsels legitimate tactical choices at the 2018 trial does not include abandoning a client's only defense citing *U.S. v. Rezin* 322 F.3d 443 at HN5 (2003). Struckman explained to the state trial court that he needed an improved chance to meet with an "able" state court appointed counsel with full copies of transcripts to attempt to be effectively advised. The state trial court pressured Struckman about the high risk of the state appointing effective assistance of counsel and how the unreasonable timing affects the states appointment of effective counsel, see attachment G at T.p.1021. The state trial court

then put to the test the unraveled Struckman rushing him to finish up his case stating "once we start tomorrow morning, we're going to continue until we're finished" see attachment G at T.p.1023, meaning Struckmans closing argument must already be prepared. The record shows a previously incompetent Struckman was encroached with duress by the 2018 state trial court in a deprived position making him powerless to dispense with the purchased 2018 trial transcripts and Struckmans application of the purchased 2018 trial transcripts during the 2018 state trial court trial is "sufficient indicia" of his lack of ability in that he was not knowingly and voluntarily waiving his right to dispense with state court appointed effective assistance of counsel's strategy. Moreover, without a meaningful exchange into a previously stipulated incompetent Struckmans broad understanding and aptitude the state trial court coerced the proceeding without clearly and precisely asking Struckman if he "waived his right to counsel" or without asking Struckman if he "waived his counsels defense" citing U.S. Const. V. , *U.S. v. Chischilly* 30 F.3d 1144 *Id.*.Struckman was never asked by the state trial court if he "waived" his right to state court appointed effective counsel before the case proceeded, he was simply asked if he "would" go forward, which is unable to clearly and precisely show a competent waiver of his right pursuant to *State v. Constable* 2005-Ohio-1239. Struckman submitted to the choice the state trial court had presented him, but that is not "equivalent to a knowing and voluntary waiver of counsel". *State v. Constable* 2005-Ohio-1239 at ¶ 33 *Id.* Struckman was never knowingly and voluntarily waiving his right to dispense with his state appointed lawyer's defense strategy and because Struckman was deprived his fundamental right to dispense with his state appointed lawyer's strategy "fair presentment" became impossible pursuant to *PA v. Richthie* 480 U.S. 39; *Verdin v. O'Leary*, 972 F.2d 1467 (1992), U.S. Const. V, VI, XIV. The fact is

that the 2018 state trial court did not expressly ask for a waiver of a right but rather the state trial court awkwardly asked Struckman if he agreed to continue which is not in full compliance with Crim.R.44(C). The Supreme Court of Ohio has never found a "constructive waiver" as an exception to the required waiver inquiry, *State v. Martin*, 2004-Ohio-5471 *Id.*. Moreover, the state trial court did not inquire into the competence of Struckman to continue in the 2018 trial or of Struckmans ability to defend himself nor did the state trial court make sure Struckman had the same understanding on the part of the defendant that a full discussion would have disclosed. All the aforesaid information relates to Struckman being deprived fair presentment of his state court appointed lawyer's defense providing that in fact the state trial court did arrange Struckman's state court appointed lawyer's defense by the state trial court purchasing trial transcripts through an unfair "off record" channel of communication on or after Friday, 4-27, 2018 with the state trial court appointed attorney without Struckman's attendance. The state trial court deprived Struckman a sufficient inquiry into his previous stipulated incompetence to determine if Struckman fully understood and intelligently relinquished the right to counsel citing *State v. Martin,* 103 Ohio St.3d 385,2004-Ohio-5471 at¶ 39; *State v. Furr* 2018-Ohio-2205 *Id.* at (*p 8). Furthermore, the 2018 trial court failed to explain circumstances in mitigation thereof and all other facts essential to a broad understanding of the whole matter. Looking at the 2018 state trial court record together with the relevant "off record" leading outstanding email evidence mentioned in state appeal C-200069 it's apparent Struckman was deprived by being rushed by the 2018 state trial court in relation to fully understanding and intelligently relinquishing his Const. VI right to counsel, furthermore, the state trial court should have noticed the Const. V right to prior incompetence stipulations and the fact that a previously

attacked and injured Struckman showed a "sufficient indicia of incompetence" which made an analysis of prior stipulations necessary for the state trial court in order to ensure a fair 2018 trial pursuant to *State v. Berry* 72 Ohio St. 3d 354. A previously stipulated incompetent Struckmans agreement to go forward was not a competent constructive waiver and most certainly was not a "full and fair" discussion disclosing the "relevant facts" essential to a broad understanding of the whole matter including all that was disregarded and omitted that had transpired "off record" on or after Friday, April 27, 2018 during the channel of communication and exchange between the 2018 state trial court and Struckman's state court appointed "full counsel's" defense strategy with the "off record" transcript evidence. Furthermore, measuring the many volumes of 2018 midtrial state trial court purchased "off record" transcripts and analyzing the 2018 state trial courts objectives in the "off record" proceeding and the "off record" weekend communications with Struckmans state court appointed "full counsel" the indication is that the 2018 state trial court committed appointment of counsel interference and the record collectively shows Struckman was deprived of his correlative right to dispense with his state court appointed lawyers help and Struckmans rights to the Const. V, VI, XIV were infringed upon. Moreover, the state court presumption of the waiver is in addition to the deprivations and irregularities that occurred at the April 27-30, 2018 on and "off record" proceedings as well as the 2018 state trial courts failure to require Struckman's state court appointed "not able" incompetent and ineffective assistance of counsel to give a clear explanation on record at the 2018 trial why he cannot represent Struckman or disclose his defense strategy. All of which shows that the state trial court infringed on Struckmans rights and deprived him of effective assistance, due process, fair trial, Const. V, VI and XIV. *Brecht*

Standard for Collateral Review On collateral review, the petition must show that, in light of the record as a whole, the error had a "substantial and injurious effect" on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619,623,113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) ("*Brecht* clearly requires examination of the record attachment G T.p. 999-1037 as a whole"), citing *Brecht v. Abrahamson*, 507 U.S. at 638. The infringement on Struckman's incompetent understanding of the Crim.R.44 and his right to state court appointed effective assistance of counsel directly affected the verdict because it deprived the opportunity for a Const. V fair trial and fair presentment. The aforementioned argument satisfies a 'reasonable probability' that Const. VI right to effective counsel was infringed upon because the evidence shows a state court appointed "not able" incompetent and ineffective assistance of counsel's serious disagreements (attach. G T.p.1015) are proven to be unfair deprivation which in turn prevented a "full and fair" review of all "off record" transcripts related to the 2018 trial and the ineffective assistance of counsel's defense strategy. What is more the state trial courts failure to ensure Struckman had competent awareness of the Crim.R.44 waivers legal outcome and that Struckman was legally capable of understanding the nature and objective of the Crim.R.44 waiver or of the proceedings or of assisting state court appointed counsel in preparing for the defense is contrary to *Dusky v. United States* 362 U.S. 402 80 S.Ct 788 789 4 L.Ed.2d. The said unreasonable deprivations by the state trial court constitutes the "substantial and injurious effect" supporting habeas relief. *Brecht v. Abrahamson*, 507 U.S. 619 at 623. The aforesaid also gives 'reasonable probability' sufficient to undermine confidence in the outcome of the proceedings. Citing *United States v. Bagley*, 473 U.S. 667, 682, 87 L.Ed. 2d 481, 105 S.Ct. 3375.

(3) The trial court abused its discretion in finding Mr. Struckman competent to stand trial.

The state appeal court determination has unreasonably disregarded and omitted the exact date on which Struckman was found legally incompetent in their 3-31-20 determination attachment J appeal C-180287: *State v. Struckman* 2020 Ohio App. Lexis 1187. Struckman was competent from the beginning of state trial on 4-25-15 until 9-19-16 on which date he was found incompetent by the state trial court. Struckman being found incompetent to stand trial in the proceeding should not have been disturbed. A defendant is presumed competent to stand trial, and the burden is on the defendant to prove by a preponderance of the evidence that he is not competent pursuant to *State v. Jordan*, 101 Ohio St.3d 216, 2004-Ohio-783, 804 N.E.2d 1, at ¶ 28. During the 8-17-16 state trial court proceedings Struckmans state court appointed counsel requested a competency hearing based on Struckman's condition due to a physical assault injury on or about 8-15-16 which caused serious injury and a possible concussion to Struckman, see attachment H assault/incident number 2016000004390. The attachment H assault injury incident 2016000004390 was made by states witness officer jones and was related to a serious injury from an attack at the building in question and is relevant to the dangerous ordnances, the property, and the charges, however states witness officer jones stated in writing in the report that the report is for informational purposes only, there is no criminal investigation. At trial states witness officer jones said he didn't make the report see attachment G transcripts at T.p. 769, 771, 780. States witness officer jones stated at the 2018 trial "I don't know anything about it". Struckman attempted to bring the incident report into the record through post-conviction state appeal C-210640 in

> *State v. Struckman* 2022-Ohio-2848 at [*p4] (4) excerpt ***
> Struckman questioned officer about 2016 incident report (5) 2016

incident report detailing officer observation. *State v. Struckman* 2022-Ohio-2848 *Id*. at [*p7] the state claims the 2016 incident report was not suppressed.

On 8-17-16 the state trial court was made aware of the "purpose" of Struckman's competence evaluation was due to a serious injury and a possible concussion from the aforementioned assault injury to Struckman related to this case, but at that time of the competency proceeding Struckman was legally incompetent and unaware of the actual tangible report made by states witness officer jones attachment H assault/incident number 2016000004390. On 8-17-16 the state trial court ordered a competence hearing, on 9-19-16 report by Dr. Nicole Snowden ("first report") contained a finding of incompetent to stand trial. It appears that the 2018 state trial court was prejudicial to Struckmans rights related to the 9-21-16 incompetent finding because as the state court is aware that at that "point in time" a finding of incompetent to stand trial was determined by the state trial court on 9-21-16 which legally determined Struckman was legally unable to have a rational as well as a factual understanding of the proceedings against him, therefore, Struckman was not legally competent to behest whatsoever by any means to the 2018 state trial court, in addition the state trial court failed to recognize or document that Struckman had a serious injury and a possible concussion and the state prosecutor "at that time" withheld states witness officer jones assault injury report , attachment H evidence citing *Brady v. Maryland*, 373 U.S. 83 (1963), a claim that entitles Struckman to relief, pursuant to *Strickler v. Greene*, 527 U.S. 263, 288 (1999). See the state trial court clinic incompetence finding with the evaluation on Sept.21,2016 at T.p.6-8. The aforesaid illustrates the state trial courts Const. plain trial error at the 9-21-16 hearing by allowing Struckman's "legally incompetent" behest to the 2018 state trial court. The aforementioned also clarifies what the

parties stipulated to in the incompetence report and what the state trial court recited in the findings, implicitly adopting them. A stipulation of fact is a binding agreement between parties as to the existence of certain facts, which may not be contradicted pursuant to *United States v. Garcia* 57 M.J. 716 at HN19. "Stipulations must be binding" "binding and conclusive" "not subject to subsequent variation", pursuant to *Std. Fire Ins. Co. v. Knowles*, 568 U.S. 588 at HN4. Nevertheless, the state courts have collectively failed to acknowledge Struckman was injured and legally unable to have a rational as well as a factual understanding of the proceedings against him to be able to stipulate anything beyond the 9-21-16 hearing, additionally, the state's stipulation to the incompetent to stand trial report should have voided any previous incompetent signatures on bond forms, findings, or waiver signatures from being considered legally competently signed and furthermore from that said point onward from the time of the stipulation to incompetency establishes "sufficient indicia" of incompetence onward throughout the state trial court proceedings such that an inquiry into the defendants *pro se* competency became necessary at each critical point in trial to ensure the defendant's Const. Amend. V right to a fair trial was protected a "full and fair" review for Const. plain trial error should be made despite the invited error doctrine. The stipulation and the record confirms through reflection Struckman had "sufficient indicia of incompetence" showing unawareness of the legal outcome in representing himself and Struckman was not legally capable of understanding the nature and objective of the proceedings or of assisting state court appointed counsel in preparing for the defense pursuant to *State v. Berry* 72 Ohio St. 3d 354 *Id.*; using *Drope v. Missouri* 420 U.S.162 95 S.Ct. 896 43 L.Ed 2d. 103; *Dusky v. United States* 362 U.S. 402 80 S.Ct. 788 789 4 L.Ed. 2d.

Furthermore, the state trial court is contrary to competency law pursuant to *State v. Sullivan* 90 Ohio St. 3d 502, because the state trial courts application of R.C. 2945.38 clearly falls short of procedural safeguards to protect Struckmans's Const. V Amend. right to due process set forth in R.C.2945.38 because the 2018 state trial court disregarded necessity of expert testimony and the relevant reports, information, or other evidence in a procedural "front-end" restorability determination. As per *State v. Neyland* 139 Ohio St.3d 353 at (*362) "nothing in R.C.2945.37 limits expert testimony" see Evid.R.702(B). Sufficient foundation was established making an expert necessary to render testimony. Without necessary testimony the determination of competent to stand trial cannot be sufficient, it is necessary for psychiatrist testimony and reports given at a hearing pursuant to *State v. Johnson* 2003-Ohio-2303 at HN5, (*p14), (*P17). Expert testimony makes the situation very different pursuant to *State v. Williams* 2015-Ohio-5113 at (*P10). Psychologist testimony is preponderantly more credible than an injured incompetent Struckman. The state court failed to acknowledge the legally required "purpose" for the competence hearing as being from the assault injury because the state prosecutor withheld attachment H information from the proceeding citing *Brady v. Maryland*, 373 U.S. 83 *Id.*. Omitted information includes hospital injury records, all of which was necessary for a "full and fair" review for a "front-end" restorability determination and it is clear that court appointed trial counsel failed to apply the "completeness of evidence doctrine" to obtain the said evidence. Therefore, due to the aforesaid unreasonably disregarded and omitted evidence and expert testimony related to the legal relation to the "purpose" during the competence procedure it is clear the state trial court's determination is founded on an "erroneous understanding of the factual record," this alone constitutes an abuse of discretion requiring

reversal pursuant to *Ortiz v. City of Chicago*, 656 F.3d 523 (2011). Furthermore "at that time" that Struckman was found legally incompetent nothing in the record shows the expert testimony necessary to sufficiently affirm Struckman was ever provided with a "front-end" course of treatment in relation to "reasonable relation to the actual purpose" being "the injury", however the 2018 state trial court forced Struckman to suffer in county jail for months with an assault injury without ever considering relevant and necessary expert testimony on record to sufficiently approve a legal "front-end" "reasonable relation to the purpose" of the multiple months' competence detainment of Struckman. Psychologist expert testimony is preponderantly more credible than an injured and incompetent Struckman. A "full and fair" review of the 2018 trial record reveals no expert testimony in conclusion to a "front-end" competency determination contrary to *State v Lorraine* 2007-Ohio-6724 at (*P23). The 2018 trial court arbitrarily ignored expert testimony citing *State v. Were* 118 Ohio St. 3d 448 at (*456). The 2018 state trial court never effectively analyzed the competence to stand trial reports because an accurate analyzation involves necessary expert testimony. The 2018 trial court cannot overcome its failure to ensure expert testimony as was necessary to give the trial court the jurisdiction over the competency legal "purpose". The docket summary attachment A-7 demonstrates the state trial court promptly initiated a whitewash with additional competence proceedings on 9-26-16 without ever having heard any necessary expert testimony. The 2018 state trial courts action is contrary to fair procedural due process and is a Const. plain trial error contributing to an infringement on Struckmans U.S. Const. XIV equal rights and V right to a fair trial. Decisions about competency to stand trial are outcome determinative in the most fundamental sense such that, if occurred, the conviction must be

reversed, *In re Gooch, 2d Dist. Montgomery* No. 19339, 2002-Ohio-6859. An October 19,2016 report prepared by Dr. Carla Dreyer ("second report") found Struckman competent, and state court appointed counsel withdrew from the case. Furthermore, see

> *State v. Struckman* 2020 Ohio App.Lexis 1187 *Id.* (attachment J) at {¶44} "his counsel could not stipulate because of his conversations with Struckman. He also felt like a conflict of interest because he might have to testify regarding competency. Consequently, the court permitted him to withdraw as counsel.

The aforesaid state appeal record is a "sufficient indicia" of Struckmans incompetence". Essentially Struckman's state court appointed counsel was aware of the "purpose" that Struckman had been very seriously injured by attackers at the residence in question and that that serious injury made Struckman in his determination "incompetent" "legally incapable of understanding the nature and objective of the proceedings or of assisting counsel in preparing for the defense". With the aforesaid "sufficient indicia" from Struckmans state court appointed counsels conflict it's clear the state trial court had failed to accept Struckman was in fact incompetent while the state trial court persisted on imposing repeated competence testing and was unrelenting in insisting an injured incompetent Struckman to be competent by ordering repeated "tie breakers" in violation of Const. V, XIV due process right and right to a fair trial pursuant to *Jackson v. Indiana* 406 U.S. 738, 92 S.Ct. at 1858, 32 L.Ed. 2d at 451. The state trial court was cruel and unusual in the proceedings by promptly ordering additional new competence exams and readily appointing new counsel in the states effort to whitewash incompetency stipulations. The state trial courts actions in turn gave rise to a December 19, 2016 report by Dr. Jordan Bell ("third report") which pleased the state trial court because it

"broke the tie" and found Struckman competent to stand trial. On the issue of reinitiating the original cash money bond however the state prosecutor found fault with the competency reports of the second and third reports which indicates issues with the reports, the issues themselves indicate a showing "sufficient indicia" Struckman was incompetent", (Dec.22,2016 T.p.7-11). In fact, the state failed to call the expert to testify regarding the reports thereby giving impression that "sufficient indicia" was overlooked and that the state was aware Struckman was incompetent. All the same when the said cash money bond became of issue the state prosecutor publicized that during the first evaluation where an injured incompetent Struckman was found showing of "sufficient indicia" of incompetence to stand trial Struckman blamed terrorist and Struckman stated "everyone should be sorry" while the state prosecutor suppressed and distorted the legal "purpose" of the evaluation which was in fact originated from an assault injury, see attach. H, citing *Brady v. Maryland*, 373 U.S. 83 *Id.*. The state prosecutor has misrepresented the incompetence legal "purpose" and diverged on the issue of cash money bond in attempting to misrepresent the "reasonable relation to the purpose" as Struckman being a threat to the public while the state was "con'usant" knowing the genuine legal "purpose" proves Struckman was not a threat, in fact the allegations were nonviolent and the relation to the legal "purpose" for the competence exams was due to Struckman being victimized in an assault and injured from the suspects at the house where the dangerous ordnance was found and the injury caused a possible concussion to Struckman, see attach. H. The state prosecutor's omission of the correct legal purpose from attach. H is unreasonable in relation to their cash money bond argument and resulted in the denial of defendant's Const. V, XIV, due process, right to a fair trial citing *United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct.

2392, 2399-2400, 49 L.Ed.2d 342, 352. *Giglio v. United States* 405 U.S. 150 relying on *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217. On the other hand, because of the recorded fact of "sufficient indicia" Struckman was "legally incompetent" and legally incapable of assisting state court appointed counsel in preparing for the defense, the record reflects Struckmans newly state court appointed counsel did not indicate he could have become effectively mindful through the legally incapable Struckman of the legal "purpose" for all the competence examinations being the assault injury on Struckman, likewise injured Struckmans lack of competent communication reveals a result in state court appointed ineffective counsel's failure to seek release of injury records from Mercy Health, Christ Hospital, University of Cincinnati. An injured Struckman's incompetent verbal self-report showing "sufficient indicia" of incompetence was, in fact "without a meaningful exchange," and the verbal self-report was worthless due to the significance of the information and sources that were not completely researched, obtained or presented. The state court abused its discretion in finding a physically injured Struckman competent without necessary expert testimony, a "full and fair" review of the factual "purpose", and adherence to incompetence stipulations. Struckmans injuries have never been proven by the state to have mended. The prejudice against Struckman is shown in later events at the 2018 trial when an incompetent Struckmans agreement to go forward was not a constructive waiver and most certainly was not a "full and fair" discussion disclosing the attach. H and relevant facts essential to a broad understanding of the whole matter, the 2018 trial record shows it was very likely Struckman never had awareness of the legal outcome. On 4-30-18 previously assaulted and injured Struckman was never asked if he waived his right to state court appointed counsel before the case proceeded; he was simply asked if he would go

forward under the persuasion of the 2018 state trial court, which is not a fair competent waiver of his right. The states aforementioned presumption that injured Struckman was capable of understanding the nature and objective of the proceedings demonstrated the state's collective rush to an infringement on Struckman's Const. V, XIV, rights citing *Brady v. Maryland*, 373 U.S. 83. Furthermore, the state appeals court failed to "fully and fairly" review the record where a preponderance of incompetence shows that the 2018 state trial court appointed ineffective counsel gave admission to serious disagreements in his breakdown of communication, see attach. G at T.p.1015. A "full and fair" review of the overlooked evidence shows the state court determination was irrational and had bias intentions which drove the state to collectively and prejudicially exploit Const. V right by allowing state prosecution to use a pattern of deceptive tactics and complex litigation which continuously targeted a vulnerable and incompetent Struckman throughout the proceedings. On collateral review, in light of the record as a whole, the error had a "substantial and injurious effect" on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619,623,113 S.Ct. 1710, 123 L.Ed.2d 353. Incompetence directly affected the verdict because it prevented the opportunity for a "full and fair" defense and opportunity for the ascertainment of truth in order for a Const. V fair trial to take place because the aforesaid "sufficient indicia" of incompetence satisfied that Struckman was not legally capable of understanding the nature and objective of the proceedings or of assisting state court appointed counsel in preparing for the defense, proving Struckman never possessed an indication of awareness of the legal outcomes, furthermore, the state did not provide the necessary expert testimony and gave the wrong impression about the legal relation to the "purpose", all of which cumulatively constitutes the "substantial and injurious effect" supporting habeas relief.

GROUND TWO: (1) The evidence at trial does not fully support the jury's finding of knowingly to prove guilt. (2) Prosecutorial misconduct, cumulative improper inferences not sufficient to prove guilt. (3) Violation of Fourth Amendment, Article 1 Section 14 of the Ohio Constitution Unreasonable searches and seizures, court erred in denying motion to suppress. (4) Trial Court erred in denying Motion in Limine, denying objections, failed to protect Defendant and limit the admissibility of prejudicial evidence, questions and statements. (b) Appellant counsel's fundamental error by refusing to correct errant facts in appellant brief and not attempting to correct prosecutor's errant facts in briefs, citing *McCarthy v. Pollard* 656 F.3d 478.

Argument

(b) Appellant counsel's fundamental error by refusing to correct errant facts in appellant brief and not attempting to correct prosecutor's errant facts in briefs, citing *McCarthy v. Pollard* 656 F.3d 478.

On Feb 03 2021 Struckman's 26(B) application for reopening was denied (see attachment A). *Strickland v. Washington,* 466 U.S. 668 *Id.* requires an ineffectiveness claim to be assessed in light of "the totality of the omitted evidence." *Washington v. Smith*, 219 F.3d 620, 634-635 (2000), quoting *Strickland v. Washington,* 466 U.S. 668 at 695. A reviewing court "must 'evaluate the totality of available ... evidence – both adduced at trial' and the additional available evidence that adequate counsel would have procured.'" *Harris v. Thompson*, 698 F.3d 609, 648 (2012), quoting *Williams v. Taylor*, 529 U.S. 362, 397, 120 S.Ct.1495,146L.Ed.2d 389 (2000). The argument in **Ground Two** asks this Federal Court to consider the 26(B) application to reopen direct appeal for Const. VI ineffective assistance of appellate counsel's defective work product omitting facts and using "errant facts". Petitioner request this Federal Court expand its analysis to include an assessment of the 26(B) "errant facts" effects in the work product assignments of error, which the state appeals court expressly did not do, the state court appointed ineffective appellate counsel failed to "participate in a "procedurally fair

setting" pursuant to *Martinez v. Ryan*,132 S.Ct. 1309 (2012). The errors in the state court appointed ineffective appellate counsel work product in the direct appellate process left serious factual errors "errant facts" contained in Struckman's brief and allowed the states prosecution appellee brief to go un-contradicted creating dangerous presumptions which in turn caused the serious factual errors "errant facts" to be drafted in the state court opinion. State court appointed ineffective appellate counsel's lack of correcting defective work product prejudicially affected the outcome of the state appeal pursuant to *State v. Leyh* 166 Ohio St. 3d 365 at [**P29]. State trial court appointed ineffective appellate counsel disregarded urgent requests sent through request letters (attachment A-6) instructing state court appointed ineffective appellate counsel to correct the work product factual errors and contradict the state prosecutor's wrong facts "errant facts" in briefs and furthermore cite the correct portions of the state trial court transcript. Now that state court appointed ineffective appellate counsel did not fulfill Struckman's request the state appeal court clerk at the state court of appeals copy-and-pasted the wrong information into the draft of the state appeal court's opinion and created hazardous presumptions in the state appeal courts unreasonable determination. Now since errant "facts" have been published in the state appeal court decision develops cause showing Struckman is prejudiced because his right to state trial court appointed effective assistance of appellate counsel has been betrayed. Struckman pleads to this Federal Court to not presume that the errant "facts" that have been published by the state appeal court are correct. Struckman recognizes the "errant facts" as grounds that entitle him to a rehearing of the "direct appeal" state appellate court decision because the "wrong" facts "errant facts" have gotten into the state appeal courts published determination and prejudices further "full and

fair" federal review with the correct facts. Struckman has steadfastly strived to remedy this issue to prevent the states "errant facts" from further corrupting a full and fair federal habeas review by Struckman providing correct facts. The state court "clearly erroneous" standard is similar to the federal standard that is used when reviewing a state court finding of facts on a petition for writ of habeas corpus. The slight difference is that the federal court will not ignore factual determinations when they are shown by clear and convincing evidence to be "unreasonable". The state courts actions in this occurrence are an "unreasonable determination of the facts",

> pursuant to *McCarthy v. Pollard*, 656 F.3d 478 (2011), whereas, we review the district court's factual determinations for clear error, and we presume that the state court's factual determinations are correct unless the petitioner can demonstrate by clear and convincing evidence that they were unreasonable.

Petitioner pleads with this Federal Court that this court grants a "full and fair" review of petitioner's demonstration in **GROUND TWO** evidence which can demonstrate by clear and convincing evidence that the state court facts in state appeal C-180287 were "unreasonable". Petitioner request this Federal Court does not leave the states "errant facts" alone and merely focus on the questions of law,

> pursuant to *Sandoval v. United States*, 574 F.3d 847, 850 (2009), whereas, we review the district court's denial of a petition for a writ of habeas

corpus under 2255 *de novo* as to legal questions and for clear error as to factual questions.

Petitioner uses "Clear error" and "clearly erroneous" as interchangeable terms. Both mean that an overwhelmingly obvious mistake has been made. The state appeal court position in the 26(B) determination (attachment A) that "evidence overwhelmingly showed that Struckman was guilty," is an "unreasonable determination of the facts." pursuant to *Badelle v. Correll*, 452 F.3d 648, 654-655 (2005), and the omitted 26(B) evidence shows that state appeal court appointed ineffective appellate counsel which unreasonably impeded work product that if incorporated would have clearly and convincingly established that Struckman's Const. V, XIV right to due process and fair trial have been infringed upon, what is more is that reasonable doubt exist in the trial exhibit PG showing Struckman is actually innocent with the states required duty to examine the record of the prior proceeding pursuant to state law citing *State v. LoveJoy* 79 Ohio St. 3d 440; also pursuant to federal law citing *Lucas v. Hamilton County Mun. Court*, 2012 U.S. Dist. Lexis 76774 at [*29-*35]. The state appeal court unreasonable determination has unreasonably safeguarded state court appointed ineffective appellate counsel in the said 26(B) state appeal determination by interpreting a finding of "overwhelming evidence of guilt" whereas this review request is "asking whether the record collectively contains evidence that could rationally lead to a contrary finding with respect to state court appointed ineffective appellate counsel's disregarded and omitted evidences" which impeded "clarifying relevant facts" showing reasonable doubt and actual innocence pursuant to *United States v. England*, 2012 U.S. App. Lexis 17071 (2012); *McShane v. Cate*, 2011 U.S. Dist. Lexis 153978, quoting *Neder v. United States*, 527 U.S. 1 at 19. The state court appointed ineffective

appellate counsel's omitted evidences and disregarded evidences brought by way of the 26(B) "could rationally lead to a contrary finding with respect to the omitted facts," making the error not harmless. State court appointed ineffective appellate counsel clearly failed to apply the "completeness of evidence doctrine" by refusing to correct "errant facts" in evidence and legal work product. The state first appellate district determination that "counsel's strategy" permits such prejudicial injustice is an unreasonable application of *Strickland v. Washington,* 466 U.S. 668, per *Harris v. Reed*, 894 F.2d 871. 878 (1990), citing *Kimmelman v. Morrison,* 477 U.S. 365. Furthermore, the state appeal court conclusion is founded on an "erroneous understanding of the factual record," this "alone constitutes an abuse of discretion requiring reversal." *Ortiz v. City of Chicago*, 656 F.3d 523 (2011). Petitioner calls attention to the existence of "reasonable doubt" in the 2018 trial court duty to examine "exhibit PG" while citing "actual innocence" pursuant to *Schlup v. Delo,* 513 U.S. 298 *Id., Herrera v. Collins,* 506 U.S. 390 *Id.,* and "miscarriage of justice" pursuant to *Wainwright v. Sykes,* 433 U.S. 72 *Id.*; *Murray v. Carrier*, 477 U.S. 478 *Id.*; *Edwards v. Carpenter,* 529 U.S. 446 *Id.*.

(1) <u>The evidence at trial does not fully support the jury's finding of knowingly to prove guilt</u>. The evidence attached to the original 26(B) filing brings to light reasonable doubt and the fact that the state appeal courts erred in their determination denying the 26(B) application for reopening. The facts in attachment A-6 and evidence submitted with the 26(B) supports this court appointed ineffective assistance of appellate counsel claim. The said facts in evidence includes state court appointed ineffective appellate counsel's 6-11-19 response letter which demonstrated by clear and convincing evidence an admission by ineffective appellate counsel of his critical mistake of publishing errant facts and failing to contradict the state prosecutors

"errant facts" in the legal work product, also submitted is appellant's demand letters stamped filed by the state court clerk attached to the 26(B) evidentiary record whereas Struckman demonstrated by clear and convincing evidence to the state court appointed ineffective appellate counsel in numerous emails and letters that once errant "facts" are published in the state appeal court's decision they are there forever and every reviewing court will presume that they are correct. Struckman's 26(B) claim distinctly proclaimed to the state appeal court the predicament his state court appointed ineffective appellate counsel errors entrapped him in and how ineffective appellate counsel's legal work product is defective and requested the state appeal court identify ineffective appellate counsel error in his representation as "prejudicially deficient with respect to the determination to avert "errant facts" in the legal work product and the references to the record as part of the "Statement of Facts", pursuant to *McCarthy v. Pollard*, 656 F.3d 478 *Id.*, *Sandoval v. United States*, 574 F.3d 847 *Id.*. The state appeal court failure to observe the demonstrated clear and convincing evidence attached to the 26(B) such as state court appointed ineffective appellate counsel 6-11-19 admission letter whereas he demonstrated by clear and convincing evidence through his admission to his own failure to remedy his errant factual errors , the evidence shows the state appeal court made an "unreasonable determination" in their failure to "fully and fairly" review the substantial and injurious effect of the errant "factual findings" being published, the state court failed to see state court appointed appellate counsel performance as "objectively unreasonable," meaning performance so unreasonable that not one judge in a hundred would agree with, "no fair minded jurist would agree with" pursuant to *Bobby v. Dixon*, 132 S.Ct. 26, 27 (2011). See also: *Miller-El v. Dretke*, 545 U.S. 231, 240-265 (2005). There is no presumption of correctness under

§2254 when state court's facts are "not at all supported by the evidentiary record"; *Wiggins v. Smith*, 539 U.S 510,520-21 (2003); and *Miller-El v. Cockrell*, 537 U.S. 322, at HN14. The 2018 trial "exhibit PG" stands alone in the 2018 evidentiary trial record showing "reasonable doubt exists in the record". Struckman through state court appointed ineffective appellate counsel was never accorded a "full and fair" opportunity to pursue justice, state court appointed ineffective appellate counsel refused to solve the "errant facts" in the legal work product which precluded the state appeal courts ability to approach a "full and fair" review. State court appointed Ineffective appellate counsel disregarded appellant's urgent necessity and demands in letters to correct "errant facts" in his legal work product, and in addition state court appointed ineffective appellate counsel failed to "object" and "oppose" to state prosecutions "errant statement of facts". What is more state court appointed ineffective appellate counsel failed to incorporate essential corrected facts or crucial evidence showing "actual innocence" to protect the defendant from the precluded issues from the prior municipal cases, by failing to emphasize 2018 trial "exhibit PG" which needed to be emphasized in the state court direct appeal record pursuant to *State v. Leyh* 166 Ohio St. 3d 365. Furthermore, the state appeal court 26(B) determination failed to require state court appointed ineffective appellate counsel correct the serious factual errors that affected the determination resulting in Const. V, XIV, fundamentally unfair proceeding due to the unreliable and ineffective assistance of counsel and thereby made the way for the state appeals court to presume overwhelming guilt without "justice". In order for state court appointed appellate counsel to have provided effective assistance he should have accentuated further in his legal work product "appellant brief" to the state appeals court about the state trial courts error in denying the rule 29 acquittal request. If

state court appointed counsel had been effective he would have also incorporated the state trial courts failure to notice the "reasonable doubt" contained in the trial exhibit PG which was submitted at the 2018 trial as attachment A-5 "the journal entry from municipal case" and the state court appointed counsel should have reminded the state appeal court of their requirement and duty to "fully and fairly" review the municipal case prior acquittal pursuant to *State v. LoveJoy* 79 Ohio St. 3d 440; also pursuant to federal law requirements in *Lucas v. Hamilton County Mun. Court*, 2012 U.S. Dist. Lexis 76774 at [*29-*35]. Furthermore, a "full and fair" analysis demonstrates state court appointed appellate counsel assistance was ineffective for failing to raise the defective "reasonable doubt instruction" as part of the cause pursuant to *Monk v. Zalez* 901 F.2d 885 at [*890]. State court appointed ineffective appellate counsel failed to argue that the state trial court committed Const. plain trial error because the state trial court jury instructions "willingness to act" language identified in the state trial has been repeatedly criticized by federal courts, as the D.C. circuit has noted "there is a substantial difference between a juror's verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him". In addition, state court appointed ineffective appellate counsel should have argued that the reasonable doubt instruction was defectively presented to the jury to be considered with the reference to "moral"' rather than evidentiary, certainty, a reasonable juror, taking the charges as a whole, could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the due process clause pursuant to *Cage v. Louisiana* 498 U.S. 39 at syllabus. The state trial court judges charge on this point "should have been in terms of the kind of doubt that would make a person hesitate to act, rather than the kind on which he would be willing to act." pursuant to *Holland v.*

United States, 348 U.S. 121 at 140. Citing *Cupp v. Naughten*, 414 U.S. 141 at 147, which holds that the conviction violates dues process because the language is constitutionally defective and it "so infected" the state trial court jury with an unreliable vehicle for determining firearm specifications R.C. 2941.144 guilt or innocence "beyond a reasonable doubt". Furthermore, state court appointed ineffective appellate counsel should have argued that the essential material element of actual possession was not possible to be sufficiently proven because the states witness officer jones testified "this weapon we do not" "I do not personally believe it to be used in the offence" see attachment G at T.p.672. Furthermore, state court appointed ineffective appellate counsel should have argued that the state prosecutor knew the suppression hearing attachment A-4 shows state witness officer sublet (officer who wrote the warrant) state that the M-10 dangerous ordnance had no reasoning for the origin of the search warrant. Furthermore, state court appointed ineffective appellate counsel failed to argue that the state trial court should not have instructed the jury on a charge that is not supported by evidence pursuant to *Rodriguez v. McMullen* 2023 U.S. App. Lexis 8643 at HN3. The state courts have allowed an "unreliable vehicle for determining guilt or innocence" pursuant to *State v. Colston* 2020-Ohio-3879 at HN12. From the nature of a state courts task in evaluating a sufficiency-of-the-evidence challenge, essentially addresses whether "the government case was so lacking that it should not have even been submitted to the jury" pursuant to *Burks v. United States* 437 U.S. 1,16,98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Furthermore, state court appointed ineffective appellate counsel failures caused the state courts to evade "full and fair" consideration of the threshold level of knowledge necessary to sufficiently prove a violation under R.C.2923.17 pursuant to *State v. Jordan* 2000-Ohio-225 HN10, requiring that the state

must prove that a defendant knew or was aware of the probability that the item in his possession is dangerous pursuant to *Staples v. United States*, 511 U.S. 600 at 610, 114 S.Ct. at 1799, 128 L. Ed 2d at 619. Citing *Liparota v. United States*, 471 U.S. 419,426,105 S.Ct. 2084,2088,85 L.Ed.2d 434,440 (1985). Citing *United States v. Murphy*, 1993 U.S. App. Lexis 1753. Petitioner cites "actual innocence" pursuant to *Schlup v. Delo,* 513 U.S. 298 *Id., Herrera v. Collins,* 506 U.S. 390 *Id.,* and "miscarriage of justice" pursuant to *Wainwright v. Sykes,* 433 U.S. 72 *Id.*; *Murray v. Carrier*, 477 U.S. 478 *Id.*; *Edwards v. Carpenter,* 529 U.S. 446 *Id.*.

(2) Prosecutorial misconduct, cumulative improper inferences not sufficient to prove guilt. Appellant filed demand letter in attachment A-6 with the state court clerk on 4-29-19 which copies of the same demand letters was sent to appellant state court appointed ineffective appellate counsel because counsel was disregarding request to include essential facts and evidence from the 2018 trial record into the legal work product "the appellant brief". One letter to state court appointed ineffective counsel is dated 4-22-19 and clearly demanded that state court appointed ineffective appellate counsel include prosecutorial misconduct. Petitioner cites *State v. Leyh* 166 Ohio St. 3d 365 at [**P12] whereas "appellate counsel failed to ensure that a complete record * was made for appellate review" by failing to include prosecutorial misconduct into the brief. Struckman made the state appeals court aware with the attached 26(B) facts in evidence which showed state court appointed ineffective appellant counsel was informed with letters and citations to parts of the record. The aforesaid evidence demonstrated by clear and convincing evidence with directives to state court appointed ineffective assistance of appellate counsel stressing to emphasize the deceptive practices in state prosecutor presentation. Petitioners 26(B) called the state appellate court attention to the 2018 trial

record and collectively concentrated the cumulative errors by the state prosecutor actions in their failing to correct state witness officer jones knowingly false testimony on the stand in violation of Struckman's Const. V, XIV, due process rights pursuant to *Giglio v. United States* 405 U.S. 150 relying on *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). The state prosecutor's deceptive practice in knowingly misleading the 2018 trial court jury that Struckman was the responsible party was prejudicially weighted with the probative value of their comments and "reflects the tenor of the state prosecutors" conduct throughout the 2018 trial, citing *State v. Wilson*, 2002 Ohio App. Lexis 1854 at ¶ 19. Of the many examples of the state prosecutor's cumulative misconduct is the state prosecutor's material misstatement in the record that "the state believes the suppressor was being <u>used</u>" see attachment G at T.p.1250. The state prosecutor knew very well that the state witness officer sublet (officer who wrote the warrant) stated on record that the M-10 <u>dangerous ordnance had no reasoning for the origin of the search warrant</u>, see attachment A-4, T.p.20. The state prosecutor also knew very well that states witness officer Jones testified in trial "<u>this weapon we do not, I do not believe it to be used in the offense</u>" see attachment G at T.p.605, 672. State court appointed ineffective appellant counsel was made aware that the state knew the dangerous ordnance had never been <u>used</u>. Undoubtedly the state knows it cannot prove Struckman ever had <u>actual possession</u> "<u>at some point</u>" to have a valid claim the dangerous ordnances (M-10 firearm or suppressor) had ever been or was being <u>used</u>. The state prosecutor deceptively bolstered guilt against Struckmans *pro se* defense presentation as though Struckman gave testimonial admission, see attachment G at T.p.1329 whereas the state prosecutor stated "how many times did Mr. Struckman say it was a locked closet" "he indicated it was a locked bedroom".

The state prosecutor commented to the jury at the 2018 trial on Struckman's *pro se* defense presentation as though it was testimony, that action at the 2018 trial affected the jury's instruction in Struckmans U.S. Const. V right to refuse to testify, citing *Griffin v. California*, 380 U.S. 609. While the jury was present the state prosecutor comments was an attempted to compel Struckman to testify through the state prosecutor deceptive strategy, the state prosecutor action caused the jury to loiter around the misunderstanding of the state prosecutor outrageous comments and misled the jury about Struckman not testifying during the 2018 trial. State court appointed ineffective appellant counsel was made aware that the state prosecutor was already aware that Struckman had already testified to the same set of ultimate facts in the prior interconnected case, see 2018 trial court "exhibit PG" journal entry of possession of marijuana C/15/CRB/10112 which was acquitted on July 12, 2017 (attachment F). The state prosecutor should not have pressured Struckman "in front of the jury during the 2018 trial" nor should the state prosecutor have continued to present their case with a deceptive strategy throughout 2018 trial in violating inference stacking rules by drawing inferences from circumstantial evidence which was falsely presumed pursuant to *State v. Armstrong*, 2016-Ohio-7841 at ¶28. To "clarify relevant facts" attachment F and attachment H evidence disproves the states false presumptions in

> *State v. Struckman* 2020 Ohio app. Lexis 1187, attachment J at {¶17} "the state presented <u>circumstantial evidence</u> showing that Struckman was the <u>only person</u> who had dominion and control over the area where the dangerous ordnances were found and that he <u>would have been conscious</u> of their presence".

Citing *State v. Burgess* 2004-Ohio-3338 at [*p34], HN8 "once a jury has reached a verdict a reviewing court, in a case where circumstantial evidence is relied upon, will reverse only where evidence is insufficient as a matter of law to enable the jury to exclude a reasonable hypothesis of innocence". The said 2018 trial "exhibit PG" journal entry factually shows the possession of marijuana trial was acquitted on July 12, 2017 and shows "actual innocence" and "reasonable doubt exists" which the state has known since July 12, 2017. Attach. A-5 shows the state court fact finders were confused of "exhibit PG" at the 2018 state trial and throughout state appeals and the state courts have collectively and continually overlooked opportunity to "fully and fairly" "clarify relevant facts" (see attach. G T.p. 88-518) and perform their duty to review the 2018 trial court "exhibit PG" and attach. F ultimate facts. If state court appointed ineffective appellant counsel had provided effective assistance, he would have made the state courts aware the said evidence completely exposes the state prosecutor's downfall by disproving their primary principle. The state courts have failed in their duty to satisfy its burden of proving that the const. error of omitting the "reasonable doubt evidence" is harmless, whereas the state must prove beyond a reasonable doubt that the defendant would have been convicted absent the existence of "reasonable doubt" citing *U.S. ex. rel. Miller v. Greer*, 772 F.2d 293, 297; *State v. Leyh* 166 Ohio St. 3d 365 at [**P12] whereas state court appointed "appellate counsel failed to ensure that a complete record * was made for appellate review". Harmlessness is a question of federal law, and not fact. *U.S. ex. Rel. Savory v. Lane*, 832 F.2d 1011,1018-19 *Id.*. "Therefore, although the court must presume that subsidiary findings of fact by the state court are correct, 28 U.S.C. § 2254(d), the ultimate determination of whether the existence of constitutional error mandates a new trial requires a *de novo* determination by this federal court." Petitioner cites

"actual innocence" pursuant to *Schlup v. Delo,* 513 U.S. 298 *Id., Herrera v. Collins,* 506 U.S. 390 *Id.,* and "miscarriage of justice" pursuant to *Wainwright v. Sykes,* 433 U.S. 72 *Id.*; *Murray v. Carrier*, 477 U.S. 478 *Id.*; *Edwards v. Carpenter,* 529 U.S. 446 *Id.*.

(3) Violation of Fourth Amendment, Article 1 Section 14 of the Ohio Constitution Unreasonable searches and seizures, court erred in denying motion to suppress.

In addition to this stated United States Sixth Amendment claim for right to counsel, Struckman's evidence suppression claim relies on the United States Fourth Amendment and a "full and fair" analysis reveals the error was not harmless, *US v. Cronic*, 466 US 648 (1984). Struckman's ground challenges the search and seizure out of concern of the reliability of the state's information that caused the illegal search and because state court appointed ineffective appellate counsel unreliably failed to raise the issue in direct appeal contrary to *State v. Leyh* 166 Ohio St. 3d 365 *Id.* and contrary to what reasonable effective assistance of counsel would have raised based on applicable law and facts of the case pursuant to *Joshua v. DeWitt*, 341 F.3d 430 (2003). State court appointed appellate counsel was duty-bound by U.S. Const. VI to have contested the illegal search in the direct appeal due to the state's warrant being supported in part by perjured statements and statements made with reckless disregard of the truth, whereas the warrant will be invalid if the remainder of the supporting affidavit does not contain sufficient basis for probable cause pursuant to *Franks v. Delaware*, 438 U.S.154 (1978); In the context of a Const. VI ineffective appellate counsel claim the prejudice prong of *Strickland v. Washington,* 466 U.S. 668 *Id.* may be established by proving two things: a showing of reasonable probability that challenging the admissibility of the evidence would have: (1) led to its exclusion, and (2) led to his acquittal; in showing defendant was prejudiced. Although the

state trial court has discretion in making its determination citing *Jackson v. Bradshaw*, 681 F.3d 753 (2010), the evidence suggest state court appointed ineffective assistance of appellate counsel failed to participate in a procedurally fair setting pursuant to *Martinez v. Ryan* 132 S.Ct. 1309 (2012) *Id.* because state court appointed ineffective assistance of appellate counsel by his own legal disregard of attachment A-6 letters prevented the opportunity for "full and fair" litigation of Struckman's Const. IV Amend. claim beyond any possibility from state direct appeal. The totality of the circumstances shows Struckman's Const. IV Amend claim never had the opportunity to be weighed because state court appointed ineffective assistance of appellate counsel's chosen disregard prejudiced the outcome of the state direct appeal proceeding pursuant to *Bobby v. Dixon*, 132 S.Ct.26, 27 (2011). On Feb 03, 2021 Struckman's 26(B) application for reopening was denied see attachment A. The state appeal court 26(B) denial determination expressed that Struckman had failed to demonstrate a genuine issue as to whether he had a colorable claim of ineffective assistance of appellate counsel. Subsequently on 3-31-2021 the state appellate court for a second time spoke on the said issue in their state appeal C-200069 record attachment B, which as a result undermined the prior state court appeal 26(B) determination attachment A.

> See (attachment B) post-conviction C-200069, *State v. Struckman* 2021-Ohio-1043 at *p28 "unnamed person from the Office of the Hamilton County Public Defender". *** "the issue of the veracity of the search warrant affidavit [was] raised in a motion to suppress," but "[t}he motion to suppress that was eventually presented in this case did not address the issue, and when the testimony at trial showed that the affidavit was wrong, it was too

> late." The letters author added that "[the]he falsehood in the affidavit does reflect poorly upon the credibility of the state's witnesses."

The aforementioned unnamed person in attachment B was in fact Struckman's state court appointed ineffective appellate counsel and in fact the state appeals court determination in attachment B *State v. Struckman* 2021-Ohio-1043 post-conviction appeal C-200069 clarifies relevant facts through reflection that it is apparent that state court appointed ineffective assistance of appellate counsel demonstrated by clear and convincing evidence by his own admission letter that he had established that a reasonable probability existed that bringing forth a claim and challenging the admissibility of the evidence on direct appeal would have: (1) led to its exclusion, because state court appointed appellate counsel revealed in his letter to Struckman through his qualified legal opinion that he sincerely supported a direct appeal Const. IV Amend. search and seizures claim with his legal expression in his letter stating that "the testimony at trial later showed that the affidavit was wrong". The aforementioned proved that evidence existed in the 2018 trial record to support the claim that the states affidavit was wrong and (2) led to Struckman's acquittal; by state court appointed appellate counsel's statement in his letter that reinforced a demonstration that in his qualified legal opinion defendant was prejudiced because the state court appointed appellate counsel's letter stated "the falsehood in the affidavit does reflect poorly upon the credibility of the state's witnesses". Furthermore, see attachment B *State v. Struckman* 2021-Ohio-1043 at *p32, whereas it is also clear that appellate counsel was aware the "states witnesses", the "police officers" who made

the falsehood in the affidavit and who were subpoenaed by law did not appear at the suppression hearing.

> See *State v. Struckman* 2021-Ohio-1043 (attachment B) at (*p32) "the warrant had included false statements material to the finding of probable cause." *** "the affidavit falsely stated that Struckman had fired a round at the victims." *** "the police officers who had been subpoenaed did not appear." ***"the affidavit was insufficient to show probable cause because the victims were not named in the affidavit and were not otherwise established as reliable witnesses. In addition, see *State v. Struckman* 2021-Ohio-1043 attachment B at (*p34) at trial "the state stipulated that "no gunshot residue was located or the results came back negative with regard to Mr. Struckman." In violation of due course see *State v. Struckman* 2021-Ohio-1043 (attachment B) at (*p35) "But the trial court found the affidavit credible *** on the presumed credibility of the victims who had reported the criminal conduct described in the affidavit.

State court appointed ineffective assistance of appellate counsel's "unreasonably objective" disregard and elimination of Struckman's Const. IV Amend. direct appeal claim impeded Struckman's opportunity to advance the said facts on appeal and demonstrated deficient performance fell below an objective standard of reasonableness and prejudiced Struckman from a Const. IV claim and a Const. VI right to effective assistance of appellate counsel as well

as a prejudiced Const. XIV right to a "full and fair" representation of the record pursuant to *State v. Leyh* 166 Ohio St. 3d 365 *Id.*. The state appeal court hypothetical opinion in attachment B *State v. Struckman* 2021-Ohio-1043 at (*p40) that the claims "could have been fairly determined on direct appeal" clearly advises that state court appointed ineffective assistance of appellate counsel by lack of due diligence is responsible. Thus Struckman maintains that had state court appointed ineffective assistance of appellate counsel deficient performance not "so undermined the proper functioning of the adversarial process that the state appeals court could have reliably produced a just result" pursuant to *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. *38, 122 L.Ed.2d 180 (1993), citing *Strickland v. Washington,* 466 U.S. 668 *Id.*. The state court appointed ineffective assistance of appellate counsel became aware the police officer witnesses falsified a "fair probability" with support from fabricated totality of circumstances material to a finding of probable cause "known as" the falsehood in the affidavit and the officers were subpoenaed to the trial court but did not appear, therefore counsel knew this violated Struckman's Const. V, XIV due process right to a fair trial and infringed on the Const. VI right to the confrontation clause by denying the defense the right to face the accusers. Furthermore, state court appointed ineffective assistance of appellate counsel failed to make a direct appeal claim illustrating that the particularity requirement forecloses the opportunity for a general search and "prevents the seizure of one thing under a warrant describing another" pursuant to *Marron v. U.S.*, 275 U.S. 192, 196, 48 S. Ct.74, 72 L.Ed.231, Treas. Dec. 42528(1927). State court appointed ineffective appellate counsel should have raised the fact that the warrant "must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized" pursuant to *United States v. Savoy*, 280 Fed. Appx. 504, 510 quoting *United States*

v. Cook, 657 F.2d 730,733 (1981). State court appointed ineffective assistance of appellate counsel should have raised the particularity requirement which eliminates the "danger of unlimited discretion in executing police officer's determinations of what is subject to seizure", pursuant to *United States v. Savoca*, 761 F.2d 292, 298-99 (1985) and "the degree of specificity required is flexible and will vary depending on the crime involved and the types of items sought" pursuant to *United States v. Henson*, 848 F.2d 1374,1383 (1988). State court appointed ineffective assistance of appellate counsel should have argued in Struckman's state direct appeal that the small locked safe containing the (M-10) dangerous ordnances was not included in the states search warrant particularity clause therefore it is not conceivable for the small locked safe to be seized because the state warrant does not reasonably ascertain and identify the small locked safe as part of the search or authorized the small locked safe to be seized or furthermore the search warrant does not authorize the small safe to be broken open. State court appointed ineffective assistance of appellate counsel should have pointed out that the suppression hearing attachment A-4 at T.p.20 demonstrated by clear and convincing evidence that states witness officer sublet (officer who generated the warrant) assert that the (M-10) dangerous ordnances had <u>no reasoning for the origin of the search warrant</u>, therefore, the "good faith" rule will not prevent application of the exclusionary rule if the warrant is clearly facially deficient in particularizing the place to be searched, or if the affidavit is so devoid of probable cause, pursuant to *State v. Broussard*, 1998 Ohio App. Lexis 3282 at HN3. The state witness officer sublet testimony is sufficient to demonstrate by clear and convincing evidence that the <u>small locked safe</u> containing the (M-10) dangerous ordnance <u>was not part of the warrant</u> or the (M-10) <u>dangerous ordnances itself was not part of the warrant</u>. Moreover, state

court appointed ineffective assistance of appellate counsel should have emphasized the fact that the dangerous ordnance was inside of a small locked safe and was not in plain view and emphasized in the warrant, "the plain view doctrine may not be used to extend a general exploratory search from one object to another until something incrimination emerges" citing *Horton v. California*, 496 U.S. 128, 136-137, 110 S.Ct. 2301, 110 L.Ed.2d 112; *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S.Ct. 2022, 29 L.Ed.2d 564. State court appointed ineffective assistance of appellate counsel failed to raise the said state witness police officer sublet testimony which demonstrated by clear and convincing evidence that the dangerous ordnance found inside of a locked safe was an object found from a separate and distinct allegation from which the alternate allegation was acquitted and therefore there was no basis or connection to the small locked safe or its contents. State court appointed ineffective appellate counsel failed to make known in the state direct appeal the lack of "fair probability" of probable cause in the search warrant as well as emphasize the direct nexus of charges from attachment E affidavit which started with inducing panic/ menacing C/15/CRB/9541 which was dismissed in 2017 and the possession of marijuana C/15/CRB/10112 attachment F, submitted during the 2018 trial as "exhibit PG" showing Struckman was acquitted of possession of the named contraband in the states defective search warrant on 7-12-17 prior to this 2018 dangerous ordnance trial. State court appointed ineffective appellate counsel failed to incorporate the totality of the said facts into the appellant legal work product and brief citing *State v. Leyh* 166 Ohio St. 3d 365 *Id.*. Petitioner cites "actual innocence" pursuant to *Schlup v. Delo,* 513 U.S. 298 *Id., Herrera v. Collins,* 506 U.S. 390 *Id.,* and "miscarriage of justice" citing *Wainwright v. Sykes,* 433 U.S. 72 *Id.; Murray v. Carrier*, 477 U.S. 478 *Id.; Edwards v. Carpenter,* 529 U.S. 446 *Id.*.

(4) Trial Court erred in denying Motion in Limine, denying objections, failed to protect Defendant and limit the admissibility of prejudicial evidence, questions and statements. Particularly the state court appointed appellate counsel had a duty to include 2018 trial motions in limine in direct appeal when adequate foundation for the motion existed pursuant to *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984). In the context of Const. VI ineffective assistance of appellate counsel claim the prejudice prong of *Strickland v. Washington,* 466 U.S. 668 *Id.*. may be established by proving two things: a showing of reasonable probability that challenging the admissibility of the evidence would have: (1) led to its exclusion, and (2) led to his acquittal. On 4-23-18 a motion in Limine was put forth at the 2018 trial by defendant to protect the defendant from precluded res-judicata issues from related municipal case. The 2018 trial "exhibit PG" was admitted at the 2018 trial to emphasize municipal case C/15/CRB/10112 acquittal whereas ineffective assistance of state court appointed appellate counsel failed to ensure a complete record of the said evidence in the state direct appeal pursuant to *State v. Leyh* 166 Ohio St. 3d 365 *Id.* at [**P12] whereas "ineffective assistance of appellate counsel failed to ensure that a complete record * was made for appellate review". State court appointed ineffective appellate counsel was made aware through prison j-pay email conversations and tangible attachment A-6 letters filed and stamped with the state court clerk urging that the 2018 motion in Limine was to be included in the direct appeal and urging it was intended to protect defendant against issues which included prejudicial evidence, exhibits and statements from prior related municipal cases. The state appeal court 26(B) determination unreasonably failed to "fully and fairly" consider Struckman's 26(B) attached evidence of letters which demonstrated by clear and convincing evidence that his 2018 motion in limine inclusion

requirement was made to his state court appointed ineffective appellate counsel requesting the 2018 motion in limine claims be raised in state direct appeal. State court appointed ineffective assistance of appellate counsel failed to bring forth the 2018 motion in limine errors pertaining to the prior related municipal trial and disregarded Struckmans important state direct appeal request to ensure a complete record contrary to law pursuant to *State v. Leyh* 166 Ohio St. 3d 365 *Id.* Petitioners demand letters demonstrate by clear and convincing evidence instructions to state court appointed ineffective assistance of appellate counsel requesting him to examine the 2018 motion in limine prior related "municipal case" C/15/CRB/10112 for prejudicial issues like "res-judicata" issues. Struckman's 26(B) application attached evidence demonstrating by clear and convincing evidence to the state appeals court in support of his request which he clearly made to state court appointed ineffective assistance of appellate counsel in the form of tangible demand letters which was also filed with the state court clerk, see attachment A-6: 26(B) four letters to state court appointed ineffective counsel filed 4-29-19, 6-24-19, 8-21-19, 1-29-20. State court appointed ineffective assistance of appellate counsel should have made known in the state direct appeal that its apparent the 2018 state trial court for reasons beyond Struckmans control never considered Struckmans arguments about the "relevant facts" pertaining to the municipal case res-judicata issues, in a "full and fair" hearing, see attachment G T.p.88,89,412,458,462,466. State court appointed ineffective assistance of appellate counsel failed to ensure a complete record in the direct appeal and petitioner emphasizes that the state appeal court determination was unreasonable because state court appointed ineffective assistance of appellate counsel in the least should have incorporated the 2018 trial court "exhibit PG" in the argument and emphasized the requirement and duty that